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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MEMPHIS FIRE DEPARTMENT and FIREFIGHTERS LOCAL UNION NO. 1784,
Petitioners,

v.

CARL W. STOTTS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

DANIEL J. POPEO
PAUL D. KAMENAR
Counsel of Record
NICHOLAS E. CALIO
MICHAEL P. MCDONALD
WASHINGTON LEGAL FOUNDATION
1612 K Street, N.W.
Suite 502
Washington, D.C. 20006
(202) 857-0240
Attorneys for Amicus Curiae
Washington Legal Foundation

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QUESTION PRESENTED

Whether in an employment discrimination case a federal district court has the remedial authority to modify a consent decree, silent in regard to layoffs, in such a manner that a bona fide seniority system calling for layoffs by reverse order of seniority is abrogated and replaced by a court-ordered quota directing that innocent employees be deprived of their jobs so that the jobs may be held by persons of a different race, where there has been no adjudication of racial discrimination by either the employer or the union in the operation of the seniority system, and where the court order benefits those who are not victims of any racial discrimination.

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BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF or Foundation) is a national nonprofit public interest law center that engages in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 200,000 members and supporters throughout the United States, including the State of Tennessee, whose interests the Foundation represents.

WLF participates in and devotes a substantial portion of its resources to cases relating to government regulations and constitutional law which involve the civil rights of citizens and small businessmen. WLF has appeared in the United States Supreme Court on many occasions as *amicus curiae*. Briefs *amicus curiae* of the Foundation have been filed with and accepted by this Court in such recent employment discrimination cases as *General Build-*

ing Contractors Association, Inc. v. Pennsylvania, 102 S.Ct. 3141 (1982); *United Steelworkers v. Weber*, 443 U.S. 193 (1979), *reh'g denied*, 444 U.S. 889 (1980); and *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979). Moreover, this same term, WLF moved and was granted permission to file an *amicus curiae* brief in *Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP, et al.*, No. 82-185, a case which presented questions virtually identical to those presented here.[1]

In the instant case, the Washington Legal Foundation seeks to advance the interests of its members and the public by urging this Court to reverse the decision of the United States Court of Appeals for the Sixth Circuit. By affirming the district court's modification of a consent decree, the Sixth Circuit has erroneously sanctioned "relief" measures which exceeded the proper scope of a federal court's remedial powers. Such "relief" measures included the suspension of a bona fide seniority system and the requirement that preferential treatment be given to minority employees in layoff situations based solely on their race, even though these individuals were *not* victims of past discrimination and there has been no adjudication of discrimination against either the employer or the union in the functioning of the City's seniority system. The district court clearly abused its discretion in granting relief which exceeded its equitable powers and contravened Title VII. Because it affirmed this clear abuse of discretion, the Sixth Circuit must be reversed.

The parties to this controversy are primarily concerned with the legality of the City's Layoff Policy. For this reason, the larger public interest issues—such as whether a federal court can order quota relief to aid nonvictims of racial discrimination—may not receive the full consider-

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[1] The questions presented in the *Boston Firefighters* case were never resolved as this Court vacated and remanded the case to the First Circuit in order to consider whether the controversy was moot. *See* 51 U.S.L.W. 4566 (May 16, 1983).

ation they deserve. Since its inception the Washington Legal Foundation has involved itself with these issues. WLF has a history of opposing both racial discrimination *and* racial quotas. Accordingly, the Washington Legal Foundation believes that its participation will assist this Court in better understanding these issues and in reaching the result that will best serve the public interest.

Both parties have consented to the filing of this *amicus curiae* brief in papers which have been filed with the Clerk of this Court.

STATEMENT OF THE CASE

In the interests of judicial economy, *amicus* adopts by reference the Statement of the Case contained in the Petition for Certiorari at 2-5.

SUMMARY OF ARGUMENT

The Sixth Circuit erred in approving the modification of the 1980 Decree ordered by the district court which overrode the provisions of a neutral bona fide seniority system. The legislative history of Section 703(h) of Title VII indicates that Congress was especially concerned that suits brought under Title VII might impair the legitimate interests of incumbent employees. Accordingly, Congress extended immunity under the statute to bona fide seniority systems such as the one referred to in the City's Layoff Policy.

Moreover, an examination of the legislative history of Section 706(g) of Title VII convincingly demonstrates that Congress intended to outlaw quota relief and to limit the remedial power of federal courts to making "whole" actual victims of racial discrimination. Hence, the district court's modification of the 1980 Decree mandating racial layoff quotas, which benefitted minority employees who were not victims of discrimination at the expense of innocent nonminority employees, was unlawful.

Even if this Court were to conclude that Congress did not intend to limit the remedial powers of federal courts

in race discrimination cases by enacting Section 706(g), additional reasons exist for overturning the decision below. First, the district court exceeded the traditional equitable limitations on a court's remedial power by affording relief to individuals who had not suffered any injury. Second, the district court's modification of the consent decree exceeded the carefully negotiated terms of the decree. Finally, the district court's order is contrary to the public interest in that it will have the effect of fostering racial polarization in the workplace.

ARGUMENT

I. SECTION 703(h) OF TITLE VII IMMUNIZES BONA FIDE SENIORITY SYSTEMS SUCH AS THE ONE INCORPORATED INTO THE CITY'S LAYOFF POLICY FROM MODIFICATION IN A TITLE VII CASE

The respondents challenge the validity of the City's Layoff Policy. They claim that requiring layoffs by reverse order of seniority, although concededly carried out in a racially neutral manner, would nevertheless violate the public policy embodied in the 1980 Decree by "devastating" minority employment and thereby carrying forward the effect of the City's alleged prior acts of discrimination in its hiring and promotion policies. In this instance, the public policy under consideration is Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* However, Section 703(h) of Title VII specifically provides that: ". . . it shall not be an unlawful employment practice for an employer to apply . . . different terms, conditions, or privileges of employment pursuant to a bona fide seniority system. . . ." Hence, laying off an employee on the race neutral basis of seniority according to a bona fide seniority system is obviously a protected condition of employment and is not subject to challenge under Title VII as the legislative history of this section indicates.[2]

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[2] The Sixth Circuit, although affirming the district court, nevertheless found, contrary to the district court that the City's seniority system was bona fide.

The original House bill of the Act, H.R. 7152, did not contain any reference to seniority systems. When the House bill reached the floor of the Senate, however, the issue of seniority received extensive attention as Senators opposing the Civil Rights Act criticized the bill for appearing to abrogate existing seniority systems and the many benefits of employment that are based upon these systems. In response to this criticism, Senators Clark and Case, the bipartisan captains in charge of explaining Title VII, introduced three documents into the Congressional Record expressing the view that Title VII would not affect existing seniority systems. One of the documents, a memorandum prepared by the Justice Department, is particularly relevant to this case. It explained that:

> If . . . a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by Title VII. This would be true even in the case where, owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. 110 Cong. Rec. 7207 (1964).

This interpretation of the interaction of Title VII with the standard "last hired, first fired" principle of employment seniority was buttressed by Senator Clark's specific response to written questions posed by Senator Dirksen:

> Question: Would the same situation prevail in respect to promotions, when that management function is governed by a labor contract calling for promotions on the basis of seniority? What of dismissals? *Normally, labor contracts call for 'last hired, first fired.' If the last hired are Negroes, is the employer discriminatory if his contract requires that they be first fired and the remaining employees are white?*
>
> Answer. *Seniority rights are in no way affected by the bill. If under a 'last hired, first fired' agreement a Negro happens to be the 'last hired'; he can*

> *still be 'first fired' as long as it is done because of his status as 'last hired' and not because of his race.* 110 Cong. Rec. 7217 (1964) (emphasis added).

The legislative history of Section 703(h) has been analyzed in detail by this Court and will not be reiterated by *Amicus*. *See Franks v. Bowman Transportation Co.*, 424 U.S. 747, 759-61 (1976); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 350-355 (1976). Suffice it to say that this Court has consistently recognized that "the unmistakable purpose of section 703(h) was to make clear that routine application of a bona fide seniority system would not be unlawful under Title VII." *Id.* at 352. *See also United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977); *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982). These cases make it clear that the City's seniority system cannot be modified under Section 703(h) absent a finding that the seniority system was established for the purpose of discriminating against minorities or that the routine operation of the seniority system injures actual victims of racial discrimination who have been denied their rightful seniority because of racially discriminatory hiring practices.[3] In this case, neither situation obtains.

When viewed as a whole, the plain meaning of Section 703(h), its legislative history, and this Court's own pronouncements regarding Section 703(h), make it evident that Congress did not intend that a violation of the Act or its underlying public policy would occur whenever minorities are the first to be laid off because of their lack of seniority as determined by a bona fide seniority system.

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[3] The unmistakable focus of both *Teamsters*, 431 U.S. at 361, as well as *Franks v. Bowman Transportation Co.*, 424 U.S. at 773, was on allowing courts to take affirmative action on behalf of *the victims* of discriminatory practices. Although "[t]here is no indication in the legislative material that § 703(h) was intended to modify or restrict relief . . . once an illegal discrimination practice . . . is proved . . .," *Franks*, 424 U.S. at 761-62, one must still be a victim of racial discrimination in order to be afforded super-seniority relief. *Id.* at 762-70.

Accordingly, this Court must hold that the City's Layoff Policy providing for layoffs by reverse order of seniority is not contrary to public policy and consequently was not subject to modification by the district court.

II. THE DISTRICT COURT EXCEEDED ITS REMEDIAL AUTHORITY UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Title VII of the Civil Right Act of 1964 empowers the courts, on a finding of unlawful employment discrimination, to provide complete equitable relief to individuals who have been discriminated against by their employers. Specifically, section 703(a) provides that:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge *any individual*, or otherwise to discriminate against *any individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive *any individual* of employment opportunities or otherwise adversely affect his status as an employee because of such *individual's* race, color, religion, sex or national origin (emphasis added).

In the recently decided case of *Connecticut v. Teal*, 457 U.S. 922, 926 (1982), this Court stressed that:

> The principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole. Indeed, the entire statute and its legislative history are replete with references to protection for the individual employee. See, *e.g.*, §§ 703(a)(1)(b)(c). . . .

Because the unmistakable "focus" of Title VII is the protection of *individuals* who suffer employment discrimination, it logically follows that members of a minority group who have not suffered such discrimination are not entitled to Title VII's protection simply because of their membership in that group. This conclusion is fully supported by section 706(g) of Title VII which sets out the remedies that a court may order upon a finding of a violation of Section 703(a).

As originally enacted, Section 706(g) provided in pertinent part:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . . , the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without backpay. . . . No order of the court shall require . . . the hiring, reinstatement or promotion of an *individual* as an employee, or the payment to him of any back pay, if such *individual* . . . was refused employment or advancement, or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 704(a) (emphasis added).

The last sentence of Section 706(g) states that even where there is a finding of employment discrimination in violation of Title VII, a court may not order relief that runs in favor of an individual who suffered adverse employment consequenecs for "any other reason than discrimination on account of race, color, religion, sex or national origin. . . ." The language could not be any clearer. Section 706(g) bars courts from issuing remedial orders that run in favor of individuals who may be members of a minority group but who have never themselves suffered employment discrimination by the actions of their employer. Thus, quota remedies, such as the type *sub judice*, are precisely the type of remedial orders barred by the

literal language of Section 706(g). The legislative history of this section reinforces this interpretation.

A. An Examination Of The Legislative History Of Section 706(g) Of The Civil Rights Act Of 1964 Demonstrates That Congress Intended To Bar Quota Relief Such As That Ordered By The District Court

H.R. 7152, the Kennedy Administration's civil rights bill, did not originally contain 706(g). The provision was added by the subcommittee of the House Judiciary Committee and first received extensive comment when the full Judiciary Committee's favorable report on H.R. 7152 was released. At that time, members opposed to Title VII issued a minority report asserting that the bill would impose "a not too subtle system of racism in-reverse." H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963) at 72, *reprinted in* 1964 U.S. Code Cong. & Ad. News 2391 at 2431.[4] These charges were rebutted early on by a statement of *Additional Views on H.R. 7152* that was issued by supporters of the bill:

> It must also be stressed that the [Equal Employment Opportunity] Commission must confine its activities to correcting abuse, not promoting equality with mathematical certainty . . . [T]he Commission will only jeopardize its continued existence if it seeks to impose forced racial balance upon employers or

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[4] It is important to emphasize that the battle lines were drawn early and remained clear throughout the legislative debate over Section 706(g). Opponents of Title VII consistently charged that 706(g) would be used by agencies of the federal government such as the Equal Employment Opportunity Commission (EEOC) and federal courts to require "quota remedies", i.e., remedies that would require employers to hire, promote or otherwise grant preferential treatment to a specified percentage of minorities based solely on the fact of their race. Supporters of Title VII just as consistently argued that nothing in the bill would permit any agency *or court* to give preferential treatment to minorities *qua* minorities. They successfully argued that Section 706(g) mandated only victim-specific remedies, *i.e.*, ones through which an actual victim of discrimination was "made whole."

> labor unions. Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices.

Id. at 2516.

When H.R. 7152 reached the floor of the House express reference was made to the remedial powers of the federal courts to handle cases initiated by the EEOC. In the opening speech in support of Title VII's passage, Representative Celler, Chairman of the House Judiciary Committee and floor manager of the bill, responded to "unfair and unreasonable criticism" that the bill would infringe the rights of nonminorities by stating that:

> [T]he [Equal Employment Opportunity] Commission could seek redress in the federal courts, but it would be required to prove in the court that that particular employer involved had in fact discriminated against one or more of his employees because of race, religion or national origin. . . .
>
> No order could be entered against an employer except by a court, and after a full and fair hearing, and any such order would be subject to appeal as is true in all court cases.
>
> *Even then, the court could not order that any preference be given to any particular race, religion, or other group, but would be limited to ordering an end to discrimination.* 110 Cong. Rec. 1518 (1964) (emphasis added).

Representative Celler's views were echoed in equally strong terms by other proponents of Title VII. For example, Representative Minish declared that "no quota system will be set up," *id.* at 1600, and Representative Goodell, a major Republican backer of the Act, interrupted a colloquy between Representatives Dowdy and Ashmore in which they suggested that Title VII would require racially balanced unions, to state:

> As I understand the gentleman's position, I do not think it can go unchallenged. There is nothing here

> as a matter of legislative history that would require racial balancing. . . . *We are not talking about a union having to balance its membership or an employer having to balance the number of employees. There is no quota involved. It is a matter of an individual's rights having been violated,* charges having been brought, investigation carried out and conciliation having been attempted and then proof in court that there was discrimination and denial of rights on the basis of race or color. *Id.* at 2804-05 (emphasis added).

Following the House's passage of Title VII a memorandum was published by the bill's House Republican sponsors which described the bill that had just been passed. The memorandum stated in pertinent part:

> Upon conclusion of the trial, the federal court may enjoin an employer or labor organization from practicing further discrimination and may order the hiring or reinstatement of an employee or the acceptance or reinstatement of a union member. But, *Title VII does not permit the ordering of racial quotas in business and unions and does not permit interference with seniority rights of employees or union members. Id.* at 6566 (emphasis added).

After H.R. 7152 passed the House, the precise scope of Section 706(g) was again fully debated in the Senate. Senator Humphrey, the majority whip and one of the floor managers of the bill, was quick to challenge the notion advanced by opponents of Title VII that 706(g) would be used to require racial balancing: "The bill does not require that at all. If it did, I would vote against it." 110 Cong. Rec. 6001 (1964). He reiterated this later with express reference to the remedial powers of the courts: "[N]othing in the bill would permit any official or court to require any employer or labor union to give preferential treatment to any minority group." *Id.* at 5423.

After seventeen days of preliminary debate, Senator Humphrey opened the debate on the merits of the bill with

the following description of the remedial powers available to a court under section 706(g):

> This relief is similar to that available under the National Labor Relations Act in connection with unfair labor practices . . . . *No court order can require hiring, reinstatement, admission to membership or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title. This is stated expressly in the last sentence of Section 707(e) [enacted, without relevant change, as 706(g)].*
>
> • • • •
>
> Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission *or to any court* to require hiring, firing, or promotion of employees in order to meet a racial "quota" or to achieve a certain racial balance.
>
> That bugaboo has been brought up a dozen times; but is nonexistent. *Id.* at 6548 (emphasis added).[5]

Senator Kuchel, another of the Senate floor leaders for H.R. 7152, agreed with Senator Humphrey that "affirmative action," as used in Section 706(g), was relief designed to make whole the individual victims of unlawful discrimination. 110 Cong. Rec. 6563 (1964). He also

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[5] A comparison of Section 706(g) and the decisions of the National Labor Relations Board under Section 10(c), the remedial section of the National Labor Relations Act, is instructive. Section 10(c) provides for the reinstatement and the award of backpay and rightful place seniority to identifiable victims of discrimination. As one commentator has noted:

> [I]n drawing from labor law the concept of "affirmative action", the drafters of sections 706(g) simply intended to enable courts in Title VII cases to prevent ongoing discrimination and to restore to the *actual victims* of unlawful employment discrimination the benefits that they had lost. Comment, "Preferential Relief Under Title VII," 65 Va. L. Rev. 729, 747 (1979) (emphasis added).

expressly denied that a court would be able to grant relief in the form of court-ordered quotas:

> If the courts find that unlawful employment practices have indeed been committed as charged, then the court may enjoin the responsible party from engaging in such practices and shall order the party to take that affirmative action, such as the reinstatement or hiring of employees, with or without backpay, which may be appropriate.
>
> • • • •
>
> But the important point, in response to the scare charges which have been widely circulated to local unions throughout America, is that *the Court cannot order preferential hiring or promotion consideration for any particular race, religion or other group. Its power is solely limited to ordering an end to the discrimination which is in fact occurring.*

Id.

During the Senate debates on the bill, the principal Senate sponsors prepared a Bipartisan Civil Rights Newsletter. The purpose of the Newsletter was, as Senator Humphrey explained, "to keep Senators who are in favor of civil rights legislation informed of our point of view." *Id.* at 5042. The April 11, 1964 issue of the Newsletter expressly declared:

> Under title VII, *not even a Court*, much less the Commission, could order racial quotas or the hiring, reinstatement, admission to membership or payment of back pay for anyone who is not discriminated against in violation of this Title. *Id.* at 14,465 (emphasis added).

Three documents that were inserted into the Congressional Record by Senator Clark support this interpretation of the limits of Title VII's remedial relief.[8] *See* 110 Cong. Rec. 7207-17 (1964). Of the three documents the

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[8] In *Teamsters*, this Court termed these documents "authoritative indicators" of the intent of the drafters of Title VII. 431 U.S. at 352.

most relevant is an interpretive memorandum, authored by Senators Clark and Case, the bipartisan captains for Title VII, which provides:

> No court order can require hiring, reinstatement, admission to membership, or payment of backpay for anyone who was not discriminated against in violation of this title. 110 Cong. Rec. at 7214.

The statements of Senators Clark, Case, Humphrey, Kuchel and others repeatedly made it clear that the Senate proponents of Title VII, like their colleagues in the House, never meant for the Civil Rights bill to be used as a vehicle to impose court-ordered quotas. Subsequent amendment of Title VII by Congress did nothing to affect this interpretation.

B. Congress Did Not Intend To Allow Court-Ordered Quotas When It Amended Title VII By Enacting The Equal Employment Opportunity Act Of 1972

Title VII of the Civil Rights Act of 1964 created the Equal Employment Opportunity Commission. However, during congressional debate on the Title, a compromise had been made which stripped the Commission of any enforcement powers. Following enactment of the law, civil rights advocates pushed for legislation to give the EEOC such power. Eight years later, they were successful when Congress amended Title VII by passing the Equal Employment Opportunity Act of 1972.

The Equal Employment Opportunity Act amended Title VII in nine different respects. The most important changes (1) extended coverage of Title VII to businesses and labor organizations with 15 or more employees or members, to state and local government employees, and to employees of educational institutions; and (2) established for the EEOC an independent general counsel who was authorized to bring a civil suit in federal court against an employer whom the EEOC had found was discriminating and with whom the EEOC had failed to secure a conciliation agreement. In essence, the 1972

amendments were adopted in order to give the EEOC the broader enforcement powers that civil rights advocates had been seeking ever since passage of the 1964 Act. It is clear that the impetus to amend Title VII did not arise from any desire on the part of Congress to allow courts to impose quota remedies for members of minority groups. In this regard, it is significant that section 703 of Title VII, *supra* at 7, was not amended at all. Section 706(g) was amended, however, only slightly. Language was added to this section authorizing federal courts to order "any other equitable relief as the court deems appropriate" in addition to "such affirmative action as may be appropriate" as originally provided in the 1964 Act.[7]

The new language added to section 706(g) originated in an amendment introduced by Senator Dominick during a Senate filibuster on the bill. The Dominick amendment was offered as a substitute to a provision in the bill that would confer "cease and desist" authority on the EEOC. It provided, instead, that the EEOC general counsel would be authorized to bring a civil action in federal court against an offending employer after the EEOC had failed to obtain a conciliation agreement. The Dominick amendment was adopted primarily in order to end the filibuster of the bill. *See* Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 Geo. Wash. L. Rev. 824, 844-45 (1972). Surprisingly, the modification of section 706(g) of Title VII

[7] Section 706(g) as amended reads in its entirety:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the Complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative relief as may be appropriate, which may include, *but is not limited to*, reinstatement or hiring of employees, with or without backpay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), *or any other equitable relief as the court deems appropriate*. [The new language is indicated in italics].

contained in the amendment was never explained by anyone—including Senator Dominick—during the debate over its adoption. Consequently, the only explanation for the change is contained in the Section-by-Section Analysis of the bill prepared by Senator Williams, the chairman of the Labor Committee and the manager of the legislation. It provides in part:

> Section 706(g)—*This subsection is similar to the present 706(g) of the Act. . . .*
>
> The provisions of this subsection are intended to give the courts wide discretion in exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that *the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole,* and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also *requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.* 118 Cong. Rec. 7166, 7168 (1972) (emphasis added).

Although the Section-by-Section Analysis states that 706(g) was amended in order to give courts "wide discretion in exercising their equitable powers to fashion the most complete relief possible," granting such relief remained contingent upon an individual actually being "aggrieved by the consequences and effects of [an] unlawful employment practice." Stated differently, the only kind of relief federal courts were authorized to provide remained "rightful place" relief limited to actual victims of unlawful discrimination.

The conclusion that the phrase concerning "other equitable relief" that was added to Section 706(g) by the 1972 amendments did not alter the victim-specific limitation on available federal remedies has been accepted by

this Court. In *Franks*, 424 U.S. at 764 n.21, this Court stated that in "add[ing] the phrase speaking to 'other equitable relief' in § 706(g) . . . [Congress] indicated that 'rightful place' was the intended objective of Title VII and the relief accorded thereunder." This Court further noted that the Section-by-Section Analysis of Section 706(g) was "emphatic confirmation that federal courts are empowered to fashion such relief as the particular circumstances of a case may require *to effect restitution, making whole insofar as possible the victims of racial discrimination* . . . ." *Id.* at 764 (emphasis added).

It is highly significant that no mention was made throughout the entire legislative history of this section—either during debate over the Dominick amendment or in the Section-by-Section Analysis prepared by Senator Williams—indicating that addition of the phrase "other equitable relief" was meant to authorize quota remedies. As it is inconceivable that so radical a departure from the anti-quota intent of the 1964 legislation would have been accomplished without any discussion whatsoever, the conclusion is inescapable that the 1972 changes in section 706(g) were not intended as an endorsement of racial quota-relief. Judicial remedial authority remained limited to making the actual victims of racial discrimination "whole" again.

Although not raised by the courts below, it has been suggested by other courts in controversies similar to the instant one that despite the fact that the legislative action undertaken by Congress in both 1964 and 1972 does not provide support for quota relief, the judicial power to order such relief may nonetheless be inferred from Congress' failure to act on certain amendments during passage of the Equal Opportunity Act of 1972.[8] Specifically, much is made of the fact that amendments introduced by

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[8] *See, e.g., Boston Firefighters Union v. Boston Chapter, NAACP*, 504 F.2d 1017, 1028 (1st Cir. 1982), which was before this Court last term but was subsequently remanded for consideration of mootness. 51 U.S.L.W. 4566 (May 17, 1983).

Representative Dent and Senator Ervin, which explicitly banned the use of racial quotas, failed to pass either the House or the Senate.

We note at the outset that use of the relatively novel theory that legislative inaction should achieve the force of law has been sanctioned by this Court only in the rarest of situations and has never been found to be sufficient, in and of itself, to constitute an authoritative indication of congressional intent. *See, e.g., Bob Jones University v. United States*, —— U.S. ——, 51 U.S.L.W. 4593, 4599-4600 (May 24, 1983). Not only is reliance on such inferences "at best treacherous", *Girouard v. United States*, 328 U.S. 61, 69 (1946), quoted in *Boys Market Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 241 (1970), but this Court has only recently affirmed, in very strong terms, that "the express procedures of the Constitution's prescriptions for legislative action" must be abided by no matter how "clumsy, inefficient, even unworkable" they might be. *Immigration and Naturalization Service v. Chada*, —— U.S. ——, 51 U.S.L.W. 4907, 4918 (June 23, 1983). Thus, in order for Congress to have authorized the remedial use of quotas by courts, it must have affirmatively taken all the steps specified in the Constitution in order for a law to exist to that effect.

Even accepting, *arguendo*, the dubious proposition that congressional intent may be inferred from congressional inaction, the congressional determinations in 1972 concerning the Dent and Ervin amendments do *not* support the view that in rejecting these amendments Congress meant to expand the limited judicial power to enable courts to order quota remedies.

The legislation that eventually became the Equal Employment Opportunity Act of 1972 began in the House in April of 1971 with the introduction of several bills designed to grant enforcement powers to the EEOC and otherwise strengthen the provisions of Title VII. One such bill, H.R. 1746, sponsored by Congressman Hawkins, contained a variety of provisions expanding the coverage

of Title VII. The bill's most significant features, however, were a provision giving the EEOC "cease and desist" powers and a proposal to transfer the authority to administer Executive Order 11246 from the Department of Labor's Office of Federal Contract Compliance (OFCC) to the EEOC.

Although the report that accompanied H.R. 1746 after it was reported out of the House Labor Committee contained no indication that the EEOC was given the power to order racial quotas many Congressmen were concerned that the bill would confer upon the EEOC such power since the OFCC had required racial quotas in its administration of Executive Order 11246 and the bill transferred OFCC's power to enforce the Executive Order to the EEOC.

In recognition of these concerns, Representative Dent, the Committee bill's floor manager, proposed an amendment to the bill shortly before debate on H.R. 1746 began. The Dent amendment provided that:

> The [Equal Employment Opportunity] Commission shall be prohibited from imposing or requiring a quot[a] or preferential treatment with respect to numbers of employees or percentages of employees of any race, color, religion, sex, or national origin. *Legislative History of the Equal Employment Opportunity Act of 1972*, 92d Cong., 2d Sess. (Comm. print 1972) 189 [hereinafter cited as 72 *Leg. Hist.*]

The express purpose of the Dent amendment was "to forbid the EEOC from imposing any quotas or preferential treatment of any employees in its administration of the Federal contract compliance program." *Id.* at 190. The amendment did not specifically address the remedial power of courts contained in section 706(g) of Title VII because, according to Representative Dent, "[s]uch a prohibition against the imposition of quotas or preferential treatment already applies to actions brought under Title VII." *Id.*

The day after Representative Dent offered his proposed amendment, House debate on H.R. 1746 began. Following opening statements both on behalf of and in opposition to the Committee bill, Representative Hawkins spoke in support of the bill. He declared that:

> *Some say this bill seeks to establish quotas . . . . Not only does Title VII prohibit this, but it establishes beyond any doubt a prohibition against any individual white as well as black being discriminated against in employment.* It only seeks to insure that persons will be treated on their individual merits and in accordance with their qualifications. *Id.* at 204 (emphasis added).

Under questioning from Representative Erlenborn, who had offered a substitute amendment for the entire Committee bill, Representative Hawkins acknowledged his support for the Dent amendment forbidding the EEOC from imposing quotas in its administration of the federal contract compliance program. He also restated his earlier expressed conviction that Title VII already "prohibits the establishment of quotas." *Id.* at 209.

The substitute amendment offered by Representative Erlenborn, H.R. 9247, differed substantially from the Committee bill that had originated with Representative Hawkins. In essence, it proposed not to give the EEOC "cease and desist" powers, not to extend Title VII to public employment, and not to transfer administration of Executive Order 11246 to the EEOC. However, Representative Erlenborn made it clear during the course of the House debate that neither the Committee bill nor his substitute "is going to repeat the prohibition against quotas that is in Title VII of the Civil Rights Act." *Id.* at 261.

Only passing reference was made to the Dent amendment during the course of subsequent House debate over the Committee bill and the Erlenborn substitute. In the House, as was later true in the Senate, the debate over amending Title VII focused almost exclusively on such

questions as whether the EEOC should be given "cease and desist" authority and whether Title VII's coverage should be extended to public employment. *See generally id.* at 191-311.

On an initial vote, the Erlenborn substitute bill carried over the Committee bill and was adopted by the House as H.R. 1746. The Dent amendment was never formally offered and was never voted upon. With passage of the Erlenborn substitute which left jurisdiction over the Executive Order with the OFCC, the Dent amendment had become moot.

Given the legislative history of H.R. 1746, it is clear that the House failure to pass the Dent amendment can in no way be construed as support for the proposition that the House approved court-ordered quotas under Title VII. On the contrary, not a single representative suggested at any stage of the House debate that a court could order quota remedies under Title VII. Just the opposite view was expressed. There was unanimous agreement that quotas were *not* available under Title VII as passed in 1964 and that the Title, as amended by the House, would and should continue to bar such quotas.

If allowing the legislative inaction of *both* Houses of Congress to achieve the force of law is "at best treacherous," *Girouard v. United States*, 328 U.S. at 69, little can be said for relying upon the legislative inaction of only *one* House of Congress. Yet in view of the fact that the House opposed quota remedies, the argument that "Congress" acquiesced in quota remedies is based exclusively on the Senate's refusal to pass the Ervin amendment. However, an examination of the legislative debate surrounding rejection of the Ervin amendment reveals once again that the case for quota remedies cannot be made.

The Equal Employment Opportunity Act was introduced into the Senate by Senator Williams as S. 2515. As reported by the Senate Labor and Public Welfare Committee, the main feature of S. 2515 was that it authorized

the EEOC to issue its own enforcement orders, subject to judicial review, directing discriminatory employers to cease their unfair practices. Most of the five week debate that followed on S. 2515 was conducted by five Senators. Senators Williams and Javits, the chairman and ranking minority members of the Labor Committee, were the floor managers and chief advocates of giving the EEOC authority to enforce its own "cease and desist" orders. They were opposed in their efforts by Senators Ervin and Allen, who said the bill would create tyrannous power in the EEOC, and by Senator Dominick who was the chief advocate for the court-enforcement approach that was ultimately adopted.

During the debate on S. 2515, Senator Ervin proposed an amendment which would have prohibited any "department, agency, or officer of the United States" from "requir[ing] any employer to practice discrimination in reverse by employing persons of a particular race . . . in either fixed or variable numbers, proportions, percentages, quotas, goals, or ranges." 72 *Leg. Hist.* at 1017.

The Ervin amendment was addressed primarily to the OFCC's adoption of the Philadelphia Plan, "[t]he most notorious example of discrimination in reverse," and secondarily to "[t]he EEOC," which "on less frequent occasions, has hailed employers before its bar to practice discrimination in reverse." *Id.* at 1042-45. Senator Ervin explained that such an amendment was necessary because officials of the OFCC and the EEOC "could not understand the plain and unambiguous words of Congress" in section 706(j).[9] Thus, the Ervin amendment was intended to extend 703(j)'s substantive liability to all federal executive agencies, particularly the OFCC and the EEOC. The

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[9] Section 703(j) of Title VII, which concerns the *substantive reach* of the Act rather than the *remedial* power of the courts, provides that "[n]othing contained in [Title VII] shall be interpreted to require any employer . . . to grant preferential treatment to any individual or group on account of" a racial imbalance in the employer's workforce.

amendment had nothing to do with the remedial authority of courts under Section 706(g) of Title VII. Consequently, even though the Ervin amendment was defeated in the Senate it cannot be taken as a congressional decision to alter the judicial remedial scheme under Section 706(g). The most that can be inferred is that in rejecting the Ervin amendment the Senate did not want to extend Section 703(j)'s substantive limitations to Executive Order 11246. However, four reasons exist for not drawing even this limited inference.

First, the Ervin amendment was offered as part of an effort to prolong an ongoing filibuster. It is entirely plausible that certain Senators seeking to end the filibuster (and who had consistently voted against all the amendments proposed by Senator Ervin) were not voting on the substance of each amendment but on the judgment that the way to end the filibuster was to vote down each amendment introduced by the filibuster's proponents regardless of the merits.

Second, it is plausible that certain Senators voted down the Ervin amendment because they agreed with Senator Williams when he declared during debate that the amendment could "be read to deprive the courts of *any* power to remedy clearly proven cases of discrimination." *Id.* at 1072-73. Thus, although these Senators may have opposed quota relief they may also not have wanted to see the courts deprived of all power to order victim-specific relief as well.

Third, not even the slightest evidence exists to suggest that the Senate decided to authorize quota remedies by amending Title VII in 1972. A step this controversial could not have failed to provoke heated debate, and yet not one shred of evidence suggests that this was the Senate's intent. On the contrary, the Section-by-Section Analysis of the 1972 amendments expressly provides that "[i]n dealing with the present Section 706(g) the courts have stressed that the scope of relief under that section

of the Act is intended to make victims of unlawful discrimination whole. . . ." *See supra* at 16-17.

Finally, even assuming, *arguendo*, the Senate favored courts ordering quota relief, the fact remains that the House unequivocally opposed racial quota relief. Consequently, legislative inaction by one House of Congress is insufficient to overturn the decision made eight years earlier by *both* Houses and signed into law by the President that banned court-ordered quotas. Accordingly, the racially-based layoff quotas ordered by the district court in favor of nonvictims of racial discrimination were unlawful.

III. THE DISTRICT COURT'S ORDER MODIFYING THE 1980 DECREE CONTRAVENES TRADITIONAL EQUITABLE PRINCIPLES REGARDING THE SCOPE OF REMEDIAL RELIEF

It is well-settled by now that while the reach of federal equitable power is broad, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971), it is not plenary. When federal courts exercise the traditional attributes of equity power they are "required to tailor 'the scope of the remedy' to fit 'the nature and extent of the . . . violation.'" *Hills v. Gautreaux*, 425 U.S. 284, 293-294 (1976).[10] Stated another way, the judicial remedial

[10] It is important to recognize that affirmative equitable remedies are, by their very nature, limited in scope. The extent of the remedy is determined by the extent of the injury. To quote Professor Pomeroy: ". . . the nature and extent of remedial rights and duties, and of the remedies themselves, must depend upon . . . the nature and extent of the primary rights which are violated, and the nature and extent of the wrong in and by which the violation is effected." 1 Pomeroy's Equity Jurisprudence 91 at 120 (5th ed. S. Symons 1941). In the instant case, the "remedy" the district court afforded the respondents was the abrogation of the City's seniority system; that system, however, was never found to have "injured" any of the respondents. Indeed, not only was the seniority system bona fide, but none of the respondents can claim that but for an illegal discriminatory refusal to be hired, they would have enjoyed greater seniority and therefore that they suffered an injury. *Cf. Franks*, 424 U.S. at 758.

powers of a federal court can "be exercised only on the basis of a violation of the law and extend no further than required by the nature and the extent of that violation." *General Building Contractors Ass'n v. Pennsylvania*, 102 S.Ct. 3141, 3154 (1982).

Past decisions of this Court have illustrated this principle in the context of suits in which racial discrimination has been alleged and found to exist. For example, in *Milliken v. Bradley*, 418 U.S. 717 (1974), the district court, pursuant to its equitable powers, ordered a multidistrict desegregation plan after finding that various acts of state officials had created racial segregation in the Detroit school system. The court of appeals affirmed. This Court, however, reversed holding that the proposed multidistrict remedy went beyond the constitutional violation because there had been no demonstration that the unconstitutional acts committed by officials of the Detroit school system had caused any racial segregation in the suburban school districts affected by the court's decree. In explicit terms this Court stated:

> [A desegregation] remedy is necessarily designed, *as all remedies are*, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct. Disparate treatment of white and Negro students occurred within the Detroit school system, and not elsewhere, and on this record *the remedy must be limited to that system.* 418 U.S. at 746 (emphasis added).

Similarly in *Pasadena City Bd. of Education v. Spangler*, 427 U.S. 424 (1976), this Court found that the district court had exceeded its remedial authority by enforcing desegregation orders so as to require an annual readjustment of attendance zones to ensure a precise racial mix absent constitutional violations. 427 U.S. at 434-35.

These and other cases stand for the proposition that the Constitution does not require, either as a matter of substantive right or as a matter of remedy, that any particular racial balance be maintained in the City of Mem-

phis' Fire Department. On the contrary, this Court has counseled against "equating racial imbalance with a constitutional violation calling for a remedy." *Milliken v. Bradley*, 418 U.S. at 741 n.19. There exists no "substantive constitutional right to a particular degree of racial mixing or balancing." *Pasadena*, 427 U.S. at 433-34; *Swann*, 402 U.S. at 24. What the Constitution does require in a remedial context, and what federal courts have the inherent equitable authority to order, is that individuals whose personal rights to nondiscriminatory treatment have been violated be restored as nearly as possible to their rightful places.

Accordingly, the racial layoff quotas that the district court mandated through the modification of the 1980 Decree clearly exceeded the traditional and fundamental limitations on the court's remedial authority to order affirmative equitable relief. The district court ordered, and the court of appeals approved, a broad decree overriding a concededly valid seniority system that was designed to aid *non*victims of racial discrimination. The question, then, becomes whether Congress, in enacting Title VII of the Civil Rights Act of 1964, intended to broaden judicial remedial authority in employment discrimination cases beyond traditional limits to include such remedial quota relief. However, as section II, *supra* at 7-24, demonstrated, Congress intended no such broadening of judicial remedial power. To the contrary, the language and legislative history of Title VII's remedial provision—Section 706(g)—both as enacted in 1964 and as later amended in 1972 demonstrate Congress' intention that racial quotas *not* be included among the affirmative equitable remedies available to courts.[11]

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[11] Both the 1974 and 1980 Decrees imposed racial quotas on the City's hiring and promotion policies. Because consent decrees are judgments and because, in accepting a consent decree, a court has the duty to ascertain that it is not putting "the court's sanction on and power behind a decree that violates Constitution, statutes or jurisprudence," *United States v. City of Miami*, 664 F.2d 435, 439

IV. THE DISTRICT COURT'S MODIFICATION OF THE 1980 DECREE WAS IMPROPER BECAUSE IT EXCEEDED THE NEGOTIATED TERMS OF THE DECREE

The 1980 Decree contained a provision stating that the district court would have continuing jurisdiction over the controversy to issue ". . . such further orders as may be necessary to effectuate the purposes of the decree." Pet. App. at A69. However, the modification undertaken by the district court was not limited to remedying the hiring and promotional violations to which the remedial provisions of the 1980 Decree were restricted. Instead, the modification concerned seniority. The district court's remedial "modification" therefore exceeds the carefully negotiated terms of the parties' agreement. The court reached out to embrace a subject that was never contemplated by the parties and, in the process, violated the guidelines for interpreting consent decrees set down by this Court:

> Consent decrees are entered into by parties to a case after careful negotiation has produced an agreement on their precise terms. . . . the *decree* itself cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and the skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971) (emphasis added).

(5th Cir. 1981), we recognize that our arguments in both sections II and III apply with equal force to the 1974 and the 1980 Decrees; that is, both decrees are unlawful because each mandated racial hiring and promotion quotas on behalf of nonvictims of discrimination in violation of Title VII and the traditional equitable limitations on a court's remedial authority. However, the validity of the district court's action in accepting the 1974 and 1980 Decrees is an issue that is not presently before this Court.

The underlying allegation of racial discrimination contained within the "four corners" of the 1980 Decree concerned hiring and promotion violations. The parties negotiated over and the 1980 Decree treated only those matters. There has been no finding that the Fire Department failed to comply with the Decree. On the contrary, progress was being made in accordance with the terms of the Decree at the time the City was forced to layoff workers. Moreover, at no point in this litigation have respondents challenged the bona fide character of the seniority system.[12] Consequently, although the district court purported to effectuate its remedial relief for hiring and promotion discrmination, it plainly exceeded the "four corners" of the document it was construing in order to override a bona fide seniority system not mentioned in the 1980 Decree and was never found to have been non-bona fide.

The district court's modification of the Decree, if upheld by this Court, would subject parties to a consent decree to a virtually unlimited power of modification by district courts based solely upon whatever the district court judge felt the parties *would have* agreed to had they considered the possibility of "new and unforeseen conditions" such as a fiscal crisis. However, the law is clear. Settlements such as the one negotiated by the instant parties, are "not to be judged against a hypothetical or speculative measure of what *might* have been achieved by the negotiators." *Officers for Justice v. Civil Service Comm.*, 29 FEP Cases 1473, 1480 (9th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). Accordingly, the modification was unlawful and cannot be upheld by this Court.

V. THE DISTRICT COURT'S ORDER IS CONTRARY TO THE PUBLIC INTEREST

The district court's modification of the 1980 Decree would allow nondiscriminatees to displace innocent incum-

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[12] *See also supra* note 2.

bents from their jobs in times of economic hardship. In addition to being contrary to law and the legislative history of the Act, displacement of innocent nonminorities in these circumstances is also contrary to the public interest.

Seniority is viewed by workers as an important earned right. Moreover, this Court has stressed that the maintenance of seniority systems is of "overriding importance" in labor law. *Humphrey v. Moore*, 375 U.S. 335, 346 (1964). Job displacement by nullifying accrued seniority, based upon mere allegations of discrimination, not only ignores the importance of seniority systems but is likely to render incumbent workers hostile toward displacing discriminatees. "[T]he displacement of whites lends credence to the idea that majority-minority interests are inherently opposed; that the subjugation of blacks is requisite to the well-being of whites; that blacks can best improve their position by attacking the interests of whites." Burke & Chase, *Resolving the Seniority/Minority Layoffs Conflict: An Employees Targeted Approach*, 13 Harv. C.R.-C.L. L. Rev. 81, 94 (1978).

Furthermore, the imposition of court-ordered quotas will ultimately result in widescale litigation based on a breach of the seniority provisions that are normally found in collective bargaining agreements. Such agreements are a product of the employer-union-employee bargaining process which is vital to the governance of industrial relations. "It does not behoove a court to second-guess either that process or its products." *California Brewers Association v. Bryant*, 444 U.S. 598, 606 (1980).

The court-ordered racially-based layoff quotas are contrary to the public interest for one final reason. As Professor Alexander Bickel stated:

> [A] racial quota derogates the human dignity and individuality of all to whom it is applied; it is invidious in principal as well as in practice. Moreover, it can as easily be turned against those it purports to help. The history of the racial quota is a

> history of subjugation, not beneficence. Its evil lies not in its name but in its effects; a quota is a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant.

A. Bickel, *The Morality of Consent* 133 (1975).

CONCLUSION

For the foregoing reasons, the Washington Legal Foundation submits that the decisions of the lower courts must be reversed.

Respectfully submitted,

DANIEL J. POPEO
PAUL D. KAMENAR
Counsel of Record
NICHOLAS E. CALIO
MICHAEL P. MCDONALD
WASHINGTON LEGAL FOUNDATION
1612 K Street, N.W.
Suite 502
Washington, D.C. 20006
(202) 857-0240
Attorneys for Amicus Curiae
Washington Legal Foundation

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